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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 241.

THE UNITED STATES, PLAINTIFF,

vs.

LESLIE G. CHASE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 23, 1889.

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1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six, before the Honorable LeBaron B. Colt, circuit judge.

No. 665, criminal docket. United States v. Leslie G. Chase.

This cause came on to be heard before the Honorable Horace Gray, associate justice, and the Honorable LeBaron B. Colt, circuit judge, sitting, and thereupon the following certificate of division of opinion between the said judges was filed:

Certificate of division of opinion. (*Filed June* 30, 1886.)

This is an indictment on the act of Congress of July 12, 1876, chapter 186, found and returned in the district court, and remitted, pursuant to section 1037 of the Revised Statutes, to this court, in which the defendant pleaded guilty, and moved in arrest of judgment.

The indictment and the motion in arrest of judgment are as follows:

2 INDICTMENT.

United States of America. District court of the United States of America for the district of Massachusetts.

At a district court of the United States of America for the district of Massachusetts, begun and holden at Boston, within and for said district, on the third Tuesday of March, in the year of our Lord one thousand eight hundred and eighty-six.

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath, present,

That heretofore, to wit, on the twenty-fifth day of January in the year of our Lord one thousand eight hundred and eighty-six at North Attleborough, in the said district of Massachusetts, Leslie G. Chase did unlawfully and knowingly deposit and cause to be deposited in the mails of the said United States then and there for mailing and delivery a certain obscene, lewd, and lascivious letter, which said letter was then and there non-mailable matter as declared by section one of an act of Congress approved on the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and which said letter is and then and there was so grossly obscene, lewd, and lascivious that the same would be offensive to the court here, and is unfit and improper to appear upon the records thereof, wherefore the jurors aforesaid do not set forth the same in this indictment, which said letter was then and there enclosed in a certain paper wrapper which said wrapper was then and there addressed and

directed as follows, that is to say, "Watchweer Print, Providence, R. I.,"
against the peace and dignity of the said United States, and
3 contrary to the form of the statute in such case made and provided.
A true bill.

FRANKLIN A. HALL,
Foreman of the Grand Jury.
GEORGE P. SANGER,
United States Attorney for the District of Massachusetts.

Motion in arrest of judgment.

And now, after plea of guilty and before sentence, comes the said Leslie G. Chase, by his attorney, W. O. Kyle, and moves the court here to arrest judgment and not to pronounce the same, because of manifest errors in the record appearing, to wit:

1. The indictment does not set forth the contents of the letter which is alleged to be obscene, lewd, lascivious, and non-mailable, nor does it describe said letter or any part thereof, nor does it in any way identify said letter.

2. The indictment does not allege that the defendant knew the contents of said letter at the time of the alleged deposit thereof in the mails of the said United States.

3. The indictment does not allege that the defendant deposited said letter in the mails of the said United States for the purpose of circulating and disposing of, or of aiding in the circulation or disposition of anything declared to be non-mailable matter by any law of the United States.

4. The indictment does not allege that the defendant deposited, or caused to be deposited, for mailing or delivery anything declared to be non-mailable matter by section one (1) of an act of Congress approved on the twelfth day of July, A. D. 1876, or by any law of the United States.

5. The indictment does not charge the defendant with any offense.
4 And because no judgment against him, the said Chase, can be lawfully rendered on said record.

LESLIE G. CHASE.
By his attorney, W. O. KYLE.

At the hearing in the circuit court upon the motion in arrest of judgment the following questions arose upon which the judges by whom the court was held were divided in opinion, viz:

First. Is the knowingly depositing in the mails of an obscene letter, enclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offence within the act of July 12, 1876, chapter 186?

Second. Does this indictment allege that the defendant deposited or caused to be deposited for mailing or delivery anything declared to be non-mailable matter by that act or by any law of the United States?

Third. Does this indictment charge the defendant with any offence?

Thereupon, at the rquest of the counsel for the United States, it is or-

dered that these questions be stated as aforesaid and be certified under the seal of this court to the Supreme Court of the United States at its next session.

HORACE GRAY,
Associate Justice.
LEBARON B. COLT,
Circuit Judge.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

5 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, certify that the foregoing is a true record of a certificate of division of opinion, filed June 30, 1886, in the cause pending in said circuit court, entitled No. 665, criminal docket, United States v. Leslie G. Chase, and ordered to be certified to the Supreme Court of the United States at the October term of said court, A. D. 1886.

In testimony whereof I hereunto set my hand and the seal of said circuit court at Boston, in said district, this seventh day of September, A. D. 1886.

[SEAL.] JOHN G. STETSON, *Clerk.*

(Indorsement on cover:) No. 241. The United States, plaintiff, vs. Leslie G. Chase. Massachusetts, C. C. U. S. Filed October 23, 1886.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

UNITED STATES
vs.
LESLIE G. CHASE. } No. 241.

UNITED STATES *v.* CHASE.

(*Circuit Court, D. Massachusetts.* June 30, 1886.)

1. CRIMINAL LAW—INDICTMENT—MOTION IN ARREST OF JUDGMENT—SECTION 1025, REV. ST.

   Under section 1025, Rev. St., a technical defect in an indictment, not tending to the prejudice of the defendant, affords no ground for a motion in arrest of judgment after a plea of guilty.

2. POST-OFFICE—OBSCENE MATTER IN MAILS—TAKING FROM MAILS—DEPOSITING SAME.

   The clause in the act of Congress of July 12, 1876, "for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same," applies only to the offense of taking an obscene publication from the mails, and not to that of depositing one in them.

Chas. Almy, jr., asst. U. S. atty., for the United States
Warren O. Kyle, for defendant.

Before GRAY and COLT, JJ.

GRAY, Justice. This is an indictment on the act of July 12, 1876, C. 186, (19 St., 90). The first two objec-

tions taken to it are that the letter alleged to have been deposited in the mail is imperfectly described, and that the allegation that the defendant knowingly deposited an obscene, lewd, and lascivious letter is defective, because, construed by the technical rules of criminal pleading, the averment is only that the defendant knowingly deposited the letter, and not that he knew its character. The first objection is supported by the decision in *Com.* v. *Wright*, 139 Mass., 382; S. C. 1 N. E. Rep., 411, and the second by the decision in *Com.* v. *Boynton*, 12 Cush., 499. But both these objections relate to defects or imperfections in matter of form only, not tending to the predjudice of the defendant, and therefore under section 1025 of the Revised Statutes affording no ground for a motion in arrest of judgment after a plea of guilty.

The third ground of the motion in arrest of judgment can not be maintained. The clause in the act of 1876, "for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same," applies only to the offense of taking an obscene publication from the mails, and not to that of depositing one in them. This construction is sufficiently manifest on the face of this act, and is confirmed by comparison with section 3893 of the Revised Statutes, of which it is an amendment and enlargement.

The fourth and fifth reasons assigned for the motion in arrest present a more difficult question, which is, in effect, whether the act of 1876, enumerating "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character," "and every letter upon the envelope of which, or postal-card upon

which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed," includes an obscene letter inclosed in an envelope or wrapper bearing nothing but the name and address of the person to whom the letter is written. The decisions in other circuits are conflicting. *U. S.* v. *Loftis*, 8 Sawy., 194; S. C. 12 Fed. Rep., 671; *U. S.* v. *Gaylord*, 11 Biss., 438; S. C. 17 Fed. Rep., 438; *U. S.* v. *Morris*, 9 Sawy., 439; S. C. 18 Fed. Rep., 900; *U. S.* v. *Comerford*, 25 Fed. Rep., 902. We are divided in opinion upon this question, and therefore, according to the usage of this court, deliver no opinion upon it, but, at the request of counsel for the United States, order it to be certified to the Supreme Court.

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In the Supreme Court of the United States.

OCTOBER TERM, 1889.

UNITED STATES
v.
LESLIE G. CHASE. } No. 241.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

This is an indictment for depositing in the United States mail for mailing and delivery "a certain obscene, lewd, and lascivious letter," the same being non-mailable matter.

The indictment is founded on section 1 of the act of July 12, 1876 (19 Stat., 90, and sec. 3893, Rev. Stat., as amended), which is as follows:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or im-

moral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same shall be deemed guilty of a misdemeanor, and shall, for each and every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court. And all offenses committed under said original section thirty-eight hundred and ninety-three of the Revised Statutes prior to the approval of this act may be prosecuted and punished under the said original section in the same manner and with the same effect as if this act had not been passed.

The indictment was found and returned in the district court, and afterwards remitted to the circuit court, under section 1037, Revised Statutes, and is as follows:

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath present:

That heretofore, to wit, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and eighty-six, at North Attleborough, in the said district of Massachusetts, Leslie G. Chase did unlawfully and knowingly deposit and cause to be deposited, in the mails of the said United States then and there for mailing and delivery, a certain obscene, lewd, and lascivious letter, which said letter was then and there non-mailable matter, as declared by section one of an act of Congress, approved on the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and which said letter is, and then and there was, so grossly obscene, lewd, and lascivious that the same would be offensive to the court here, and is unfit and improper

to appear upon the records thereof, wherefore the jurors aforesaid do not set forth the same in this indictment, which said letter was then and there inclosed in a certain paper wrapper, which said wrapper was then and there addressed and directed as follows—that is to say, "Watchweer Print, Providence, R. I."—against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

I true bill.

FRANKLIN A. HALL,
Foreman of the Grand Jury.
GEORGE P. SANGER,
United States Attorney for the District of Massachusetts.

The defendant pleaded guilty (R., p. 1), and then moved in arrest of judgment (R., p. 2).

On the argument of the motion in arrest of judgment the following questions arose upon which the judges by whom the court was held were divided in opinion, namely:

First. Is the knowingly depositing in the mails of an obscene letter, enclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offence within the act of July 12, 1876, chapter 168?

Second. Does this indictment allege that the defendant deposited or caused to be deposited for mailing or delivery anything declared to be non-mailable matter by that act or by any law of the United States?

Third. Does this indictment charge the defendant with any offence?

FIRST QUESTION.

"Is the knowingly depositing in the mails of an obscene letter, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the

letter is written, an offense within the act of July 12, 1876, chapter 186?"

In discussing this question it will be assumed for the present that the offense charged is that of depositing an obscene "writing" in the mails, and our attention will be confined to the question whether such a writing so deposited is taken out of the statute because it is private in character and inclosed in an envelope or wrapper upon which there is nothing inscribed but the name of the person to whom it is written.

In other words, the question is whether to make obscene matter unmailable under the law it must have been published like a book or newspaper before being deposited in the mails.

To determine this question it is necessary to look at the previous legislation on this subject.

The first regulation declaring obscene matter unmailable was the act of March 3, 1865, section 16 (13 Stat., 507), which declares "that no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character shall be admitted into the mails of the United States." * * *

By section 148 of the act of June 8, 1872 (17 Stat., 283), entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department," it is provided as follows:

> SEC. 148. That no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card upon which scurrilous epithets may have been written or printed, or disloyal devices printed or engraved, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or for delivery any such obscene publication shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall for every such offense be fined not more than five hundred dollars, or imprisoned not more than one year, or both, according to the circumstances and aggravation of the offense.

On March 3, 1873, an act was passed "for the suppression of trade in, and circulation of, obscene literature and articles of immoral use" (17 Stat., 598). By section 2 of this act it was declared that section 148 of the act of June 8, 1872, should be amended to read as follows:

> SEC. 148. That no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, or any notice, or paper

containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.

This amendment of section 148 constituted the original section 3893 of the Revised Statutes, and remained such until supplanted by the above quoted section 1 of the act of July 12, 1876.

Looking now at section 148 of the act of 1872, we see that it declares that—

No obscene book, pamphlet, picture, print, *or other publication* of a vulgar or indecent character * * * shall be carried in the mail.

And it might, perhaps, have been held that under that section nothing was made unmailable for obscenity that did not, at the same time, answer to the description of a "*publication.*"

But, on the other hand, it seems hard to conclude that Congress could have intended that an obscene book, or pamphlet, or print, or picture, privately printed, and, therefore, not a "*publication*" in the ordinary sense of that word, should be mailable matter.

Section 148, as amended by the act of 1873, adds the epithets "lewd and lascivious" to the words "book, pamphlet," etc., and, for the first time, introduces the word "*letter*," by declaring that no "*letter upon the envelope of which* * * * indecent or scurrilous epithets may be written or printed shall be carried in the mail."

The act of July 12, 1876, adds to the words "book, pamphlet," etc., the word "*writing*."

Upon the point whether an obscene writing, to come within the law, must be a publication in the sense of a book or pamphlet, or may be private, such as a writing contained in an envelope or wrapper on which is inscribed only the address, there is considerable conflict of opinion.

In *United States* v. *Gaylord* (17 Fed. Rep., 438, decided in July, 1883), the question of the sufficiency of an indictment charging that the defendant "unlawfully and knowingly" deposited in the mail "an obscene, lewd, and lascivious writing, *purporting* to be a letter * * * and which said writing was then and there inclosed in a letter envelope," came before Judge Drummond. The indictment was founded on

the act of July 12, 1876, and the ground of defense was that the writing named in the indictment was not within the act.

The court held the indictment good in an elaborate opinion, the force of which is enhanced by the statement that it had been submitted to Mr. Justice Harlan and that he concurred "in the conclusion that the writing described in the indictment comes within the terms of the statute, and that it was non-mailable matter."

In *United States* v. *Hanover* (17 Fed. Rep., 444) the decision of Judge Drummond was followed by Commissioner Harper, of the southern district of Ohio, and by Commissioner Probasco, of the same district, in *United States* v. *Britton* (17 Fed. Rep., 731).

In *United States* v. *Morris*, decided January 4, 1884 (18 Fed. Rep., 900), Judge Deady held that depositing in the mail obscene matter contained in a sealed envelope was within the statute, although he had ruled, previously, in *U. S.* v. *Loftis*, 8 *Sawy.*, 194 (S. C., 12 Fed. Rep., 671), that while "*writing*" was comprehensive enough

to include a "*letter*", it was used in the statute in the sense of "*publication.*"

The learned judge said that since his former decision he had learned that Judge Sawyer had held otherwise in several unreported cases in the district of California, and that while Mr. Justice Field had not ruled on the point, he had indicated an inclination to agree with Judge Sawyer. He stated also that he had been informed that the word "*writing*" was added to the law after Mr. Justice Blatchford had held that an obscene writing or letter was not included in section 3893.

The learned judge, after referring to "the able and convincing opinion" of Judge Drummond, concurred in by Mr. Justice Harlan, and stating that he felt it to be his duty to yield to the other view, goes on to say that his confidence in his opinion in *United States* v. *Loftis* is "*very much* shaken."

In *United States* v. *Thomas*, decided May 30, 1886 (27 Fed. Rep., 682), it was held by the district court for the southern district of Mississippi that an obscene letter sealed is within

section 3893, Revised Statutes, as amended by the act of July 12, 1876.

In *United States* v. *Foote* (13 Blatch., 418), decided by Judge Benedict, July 17, 1876, it was held that a notice in the form *of a letter inclosed in a sealed envelope*, giving information how an article designed for the prevention of conception could be obtained, was within section 3893.

The argument advanced and rejected in that case was, that a "notice," to be within the statute, must be one giving *public information.*

In *Thomas* v. *The State* (103 Indiana Rep., 420) it was held that a conviction for sending by mail "a lewd and obscene letter" was proper under a statute of the State of Indiana making it an offense to deposit "in any post-office in this State * * * any lewd, obscene, indecent, or lascivious book, *paper*, pamphlet, drawing, lithograph," etc., and the court said that the word "*paper*," in the statute, was sufficient to embrace a *letter*, and adopted much of the reasoning of Judge Drummond in *United States* v. *Gaylord* (*supra*).

Opposed to these cases are *United States* v. *Williams*, 1880 (3 Fed. Rep., 484), before Com-

missioner Allen, E. D. New York; *United States* v. *Comerford*, 1885 (25 Fed. Rep., 902), before the district court W. D. Texas, Turner, J.; *United States* v. *Mathias*, 1888 (36 Fed. Rep., 892), circuit court D. S. Carolina, Simonton, J.

These cases proceed on a much narrower view of the law than those previously cited. They decide that the context, in which the word "writing" occurs, requires that it should be taken in the sense of "publication"; that is, *a writing published*, like an ordinary book or pamphlet.

These cases would be more instructive if they gave some definite idea of what a published writing is. It is difficult to imagine such a thing in these days of the printing-press, and still more difficult to conceive what it was that could have prompted Congress to amend the law for the express purpose of declaring non-mailable *published writings* of an obscene character, for we do not believe that such a vehicle for circulating obscene matter was ever deposited in the mails or anywhere else.

To suppose, then, that the attention of Congress was attracted to so improbable, not to say impossible, a use of the mails, seems unreasonable, and a very needless departure from the rule that the words of a law are to be read in their ordinary sense, unless some good reason exists for giving them another meaning

The intention of Congress being, manifestly, to prevent the mails from being made instrumental for immoral purposes, it can hardly be in furtherance of that intention to put this narrow sense on the word "writing," which makes that word mean almost nothing at all, so far as purging the mail service is concerned.

This view derives no little support from the intimation of Judge Deady in *United States* v. *Thomas* (*supra*), that Congress added the word "writing" to the law because of the ruling of Mr. Justice Blatchford that it was not an offense under section 3893 to deposit an obscene writing or letter in the mails; and, considering the eminence of the judge who made that ruling, we may fairly conclude that it was the cause of the amendment.

The intention of the law being to protect the mails from the contamination of obscene matter, it becomes the duty of the court, it would seem, to carry out that intention by giving the law all the scope of which its language will properly admit. In *United States* v. *Hartwell* (6 Wall. 395, 6) the court supports this view, as follows:

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

The principle that the meaning of words is controlled by the context where they are found,

which is appealed to in support of the restricted construction, really seems to have no application in this case, for the word "writing" was *added by amendment* for the purpose of *increasing* the efficiency of the statute by extending it to a new matter; and it is unreasonable to say that the Congress that made the amendment intended that "*writing*" should mean "*publication*," and no more, merely because it is placed among words that have the latter sense.

If Congress had used the word "*letter*" instead of "*writing*," would it have been a valid argument to say that "letter" must be taken in the sense of "*publication*"?

It is no answer to say that the use of "*letter*" would have necessarily evinced a different intent, for the absurdity to which the construction leads that "*writing*" means a "*publication*"—and so means nothing at all—affords as strong an argument in favor of our view as could have been deduced from the use of the word "letter."

But we venture the remark that the argument based on the words "*other publications*," in the law, is based on a misconception of the true

meaning of those words. We do not think it was the purpose of Congress to use the word "*publication*" in the technical meaning it has among dealers in books and literary persons. We think it has a larger sense and that it is, as used, the equivalent of printed matter of the description mentioned.

To give the word some such sense seems necessary unless it is legitimate to conclude that Congress intended that an obscene, lewd, or lascivious book, pamphlet, picture paper or print *should be mailable if privately printed and not offered for sale or public distribution.* We do not see how any such deduction can be made from a law passed for the sole object of preventing the mails from being used for immoral and indecent purposes.

The intention of the statute being clear, its language must be made to yield and adjust itself to that intent.

Moreover, our reasoning as to the meaning of "publication" is precisely the same as that employed by Judge Drummond in *United States* v. *Gaylord* (*supra*) for the purpose of showing that the word "*letter*," as used in a subsequent part of

the statute, can not be taken in its ordinary sense without plainly defeating the object of the law. We give the following extracts from the judge's opinion:

It is claimed in the argument that the word "writing" can not mean letter, because the latter word is used in the same section in which is declared non-mailable "every letter upon the envelope of which, or postal-card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed." Now, if in construing this part of the statute we are limited to the technical meaning of the word "letter," then, if a person should inclose in an envelope addressed to another a harmless picture, or even the "sermon on the mount," or should inclose nothing in the envelope, and cover it with obscene pictures or language, and deposit it in the post-office to be transported in the mail, he would not be guilty of a violation of this clause of the statute, because it would not be a letter inclosed in an envelope; and yet it would be difficult to state why that is not within the meaning and intent of the law, and so would subject the person to the penalty thereby imposed.

Suppose a letter is written, and it is not inclosed in any envelope, but is folded up and addressed on the very paper upon which the letter is written, as was generally the case many years ago, when postage on a single letter was 25 cents; now, in the case supposed, there is no envelope, such as that literally described in the statute, but if the writer or any one else should cover the outside of that letter, thus written and folded, with obscene pictures or languages, and deposit it in the post-office to be carried in the mail, would any one pretend that was not a violation of the statute, simply because it was not a letter inclosed literally within an envelope? Would not the letter itself constitute an envelope?

* * * * * * *

It is true that a criminal or penal statute should receive a strict construction; but it must be a reasonable construction, in reaching which must be considered the object the legislature had in view in the words used. Here it is manifest that Congress intended to purge the mails, to prevent anything of the character described from being deposited in a post-office for mailing or delivery, or to be carried in the mails, and it would seem immaterial whether the thing prohibited is inside or outside of an envelope, and it would therefore appear to be unreasonable to hold that Congress intended not to allow a decent

writing to be put in an obscene envelope, but at the same time to permit an obscene writing to be put in a decent envelope. Each would clearly appear to be within the meaning of Congress, and the very thing which the statute intended to prevent.

It is asked how can the prohibitions of the statute apply to sealed writings, so as to be effective? But it certainly is not a valid argument to say that because a sealed letter can not be violated the prohibition of the law does not extend to it. It may not be rejected from the mail, like an undisguised obscene picture, but when the person to whom it is addressed makes known its contents the penalty of the law may be enforced against the sender without any invasion of private rights.

If the construction is adopted that obscene matter must be *openly* such to be non-mailable, the result will be that all obscene matter will be sealed and the statute will become a dead letter.

The argument that, as the offense of taking from the mails is confined to a taking for the purpose of circulating or aiding in the circulation or disposition of non-mailable matter, it must be inferred that the statute intended that the obscene non-mailable matter *deposited* in the mails for

delivery should be of the same character has been exploded by Mr. Justice Gray in this very case (27 Fed. Rep., 808, *United States* v. *Chase*) where he said that the offense of depositing obscene matter in the mails was one thing and that of taking such matter from the mails another thing, and that the inference drawn from the language used in connection with the latter offense was not applicable to the former.

The failure to notice this fundamental distinction between the offenses of depositing obscene matter in and taking such matter from the mails misled the court in *United States* v. *Mathias*, (36 Fed. Rep., 896).

If, however, a "writing," to come within the statute, must have been published, is it not a sufficient publication that it was received by the person to whom it was directed? As Blackstone says, speaking of the publication necessary to make the offense of libel, "The communication of a libel to any one person is a publication in the eye of the law." (4 Comm., 150 c.)

It is submitted that this question should be answered in the affirmative.

THE SECOND QUESTION.

"Does this indictment allege that the defendant deposited or caused to be deposited for mailing or delivery anything declared to be non-mailable matter by that act [*i. e.*, of July 12, 1876, ch. 168,] or by any law of the United States?"

The indictment charges the defendant with "unlawfully and knowingly" depositing for mailing and delivery "a certain obscene, lewd, and lascivious *letter*," addressed "Watchweer Print, Providence, R. I."

The statute declares any obscene "*writing*" non-mailable.

The indictment does not use the word "*writing*," but "*letter*."

It is enough, however, if the language employed is the *equivalent* of that used in the statute. It was so ruled by Mr. Justice Story in *United States* v. *Batchelder* (2 Gall., 15, 18) and is established law (Wh. Cr., Pl. & Pr., § 236, 9th edition, and cases cited; 1 Bish. Cr. Pro., § 611, cited with approval in *United States* v. *Simmons*, 96 U. S. 362; *State* v. *Gove*, 34 N. H., 570).

In *Caldwell* v. *The State* (2 Tex. App. 55) it was held, under a statute making it an offense under certain circumstances to herd any "*drove* of horses or cattle," etc, that an indictment describing the stock as "fifty head of cattle," instead of calling them a *drove* of cattle, was good.

In this case the offense is described substantially in the language of the statute, because, as Judge Drummond says in *United States* v. *Gaylord* (*supra*):

> *A letter is certainly a writing.* If addressed by one person to another, while we may call it a letter, it is also a writing, whether the characters are made with a pen or by type, or in any other similar manner.

It is submitted that this question should be answered in the affirmative:

THIRD QUESTION.

"Does this indictment charge the defendant with any offense?"

The indictment, like that in *United States* v. *Gaylord*, charges that the defendant "*unlawfully and knowingly*" deposited, etc.

The indictment does not set out the obscene letter, which, however, was not required, for the records of a court of justice are not to be made

vehicles for spreading obscenity before the public. The accused can get full knowledge of the charge against him by an order for a bill of particulars and for a production of the obscene document itself. (*United States* v. *Foote*, 13 Blatch., 419; *United States* v. *Bennett*, 16 Blatch., 339; Wh. Cr. Pl. & Pr., § 177, 9th ed.)

It may be further remarked that the obscene letter is sufficiently individuated by the averment of the address that was inscribed upon it.

The court below sustained the objections to the indictment that the letter was imperfectly described and that the allegation that the defendant *knowingly* deposited the obscene letter, meant that he only knowingly deposited the letter and not that he knew its character.

These objections were held, however, not to be available under section 1025, Revised Statutes, on a motion in arrest of judgment after a plea of guilty.

It is supposed, therefore, that these objections are not embraced by the questions certified.

If, however, the two questions passed upon by the eminent circuit justice and his associate are

open here under the third question certified, it may be proper to say as to the point, that the *scienter* is not properly averred, because the word "*knowingly*," in the indictment, must be referred to the act of depositing the obscene letter, that an indictment precisely similar, in this respect, was sustained, upon great consideration, by Blatchford, Benedict, and Choate, JJ., in May, 1879, in *United States* v. *Bennett* (16 Blatch., 338).

In view of this ruling, I may, perhaps, say that the cases on the authority of which the point was decided below may be considered as unduly rigorous. The words "*unlawfully and knowingly*," when taken in connection with the word "deposit," would seem to charge, necessarily, that the defendant deposited the obscene letter in the mails with knowledge of its contents, for in no other way could it have been an offense to deposit it.

May it not then be said that the law has been laid down with too much rigor in the cases on the authority of which the court of below sustained the objection?

As to the other objection, that the letter is imperfectly described in the indictment.

Of course it is no longer an open question that the records of courts are not to be made the vehicles for perpetuating and publishing obsenity. (Whart. Cr. Pl. & Pr., § 177; *United States* v. *Bennett ubi supra*; *U. S.* v. *Foote*, 13 Blatch. *ubi supra* But see, *contra*, the recent case, *State* v. *Hayward*, 83 Mo., 299).

It is said, however, that some idea can be given of the purport of the obscenity complained of without offending decency, as in *United States* v. *Bennett*, *supra*, where the title of the obscene book was given in the indictment.

In this case may it not be properly said as above remarked, that the letter is sufficiently individuated by the averment of the address that was inscribed on it, to-wit, Watchweer Print, Providence, R. I. Would the record be, practically, more specific if the indictment contained some general reference to the matter of the letter? In neither case could the record be sufficient to support a plea of former conviction or acqittal without extraneous aid. As to the rights of the

accused on his trial, he can call for the obscene document itself and, therefore, can not possibly be prejudiced by the generality of the indictment.

It is respectfully submitted that this question should be answered in the affirmative.

WM. A. MAURY,

Assistant Attorney-General.

APPENDIX.

ACT OF CONGRESS OF SEPTEMBER 26, 1888, 25 STAT., 496.

SEC. 2. That section thirty-eight hundred and ninety-three of the Revised Statutes, as amended by the act of July twelfth, eighteen hundred and seventy-six, is hereby so amended as to read as follows:

"SEC. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five

thousand dollars, or imprisonment at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself."

Supreme Court of the United States.

No. 241. October Term, 1889.

UNITED STATES *v.* LESLIE G. CHASE.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR DEFENDANT.

I.

The questions presented in the certificate of division in this case are insufficient to invoke the jurisdiction of this Court, for the following reasons: —

First. Said questions do not present distinct points of law.

Second. It appears on the face of said certificate that the division of opinion was not upon a question of law within the meaning of Sect. 651 of the Revised Statutes, but was in effect whether under all the circumstances of the case judgment could be entered on the record.

Third. By said certificate the whole case is sent up, contrary to the rules repeatedly laid down by this Court in former cases.

United States *v.* Hall, 131 U.S., 50.
United States *v.* Perrin, *Idem*, 55.
Jewell *v.* Knight, 123 U.S., 426, and cases cited.

In the case of United States *v.* Northway, 120 U.S., 327, the Court says: "The question whether either of said counts

charges said defendant with an offence under the laws of the United States, which is the first one certified, we decline to answer, for the reason that it is too vague and general within the act of Congress authorizing certificates of this character and the repeated decisions of this Court."

To this objection the second and third questions of the certificate in the present case are clearly open, and this Court, following recent precedents, may on this ground decline to consider them.

The first question, while presenting a question of law, is objectionable for the third reason above stated; namely, that it refers the whole case to this Court for decision, thereby invoking the exercise of original rather than appellate jurisdiction.

In White *v.* Turk, 12 Pet., 238, there were presented definite questions of law; but the Court say in the opinion: "Had the Court agreed in opinion and rendered a judgment on the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this Court; and if we were to decide the questions presented, it would in effect be the exercise of original rather than appellate jurisdiction."

This Court is always and only an appellate Court except in the limited class of cases where the Court has original jurisdiction.

United States *v.* Perrin, 131 U.S., 55–58.
United States *v.* Bailey, 9 Peters, 267.

It is for the Legislature to define a crime and ordain its punishment, and it is not the duty of this Court to determine what facts constitute the crime, and whether in the particular case the punishment should be inflicted. If such questions can be sent here for decision because new or difficult in the particular instance, then this Court must become as to new and difficult questions practically a *nisi prius* trial Court.

It is no answer to this objection to say that no other method is provided for bringing here for construction the enactments of

Congress in regard to crimes and misdemeanors, as to which there may be conflicting decisions in different circuits. If defect in the judicial system exists it must be remedied in the proper way, and will not be cured by the assuming of jurisdiction not conferred by law.

II.

The questions in the present case should not be answered, because it appears upon the record that there is a fatal defect in the indictment on which, as we contend, no judgment can be entered.

United States *v.* Buzzo, 18 Wall., 125.
United States *v.* Britton, 108 U.S., 207.

The indictment is fatally defective because it does not allege that the defendant knew the contents of said letter at the time of the alleged deposit thereof in the mails of the said United States.

There can be no doubt that an essential ingredient of the offence, under the act of Congress upon which this indictment is founded, is the guilty knowledge or evil intent of a party in depositing in the mails that which he knows to be non-mailable matter. This is necessarily implied by the language of the statute, which imposes a penalty upon any person who shall knowingly deposit for mailing anything declared to be non-mailable matter.

Such being the nature of the offence charged upon the defendant, he has a right to insist that it should have been formally and substantially described; that is, set out in the indictment with technical precision and accuracy, according to the rules of the common law.

Commonwealth *v.* Boynton, 12 Cush. (Mass.), 499, 500, and cases cited.

Commonwealth *v.* Boynton was an indictment upon Rev. Stat. of Mass., c. 131, Sect. 1, for selling diseased, corrupted, and unwholesome provisions.

The language of that statute is as follows: –

"Whoever knowingly sells any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, shall be punished by imprisonment in the jail not exceeding six months, or by fine not exceeding $200."

The language of the indictment was as follows, viz.: "did knowingly sell unto one Jeremiah Barker, a certain piece of diseased, corrupted, and unwholesome provision, to wit: one hind-leg of veal, the said Boynton not then and there making fully known to said Barker that the same was diseased, corrupted, and unwholesome," etc.

After conviction the defendant moved in arrest of judgment for insufficiency of the indictment, which motion being overruled he appealed to the Supreme Judicial Court. Mr. Justice Bigelow, in delivering the opinion of the Court, the decision being "Judgment Arrested," said: "It is a familiar rule of criminal pleading, that wherever the intention of a party is necessary to constitute an offence, such intent must be alleged in every material part of the description where it so constitutes it." (Cites 1 Chit. Cr. Law, 232, 233; Rex *v.* Rushworth, 1 Stark R., 396; and S. C. Russ & Ry., 317; Commonwealth *v.* Slack, 19 Pick., 304, 309.)

"In the present indictment, the only distinct averment of knowledge on the part of the defendant is, that he 'knowingly sold' corrupt and unwholesome meat.

"There is no averment that he knew the meat to be in a diseased and unhealthy state, or unfit for food at the time of the sale. The word 'knowingly' does not apply to and qualify every act charged essential to constitute the offence under the statute; strictly speaking, and construing the language of the indictment according to the technical rules of pleading, it qualifies and gives significance only to the word sell; so that in substance and legal effect, the averment is only that the act of sale was done by the defendant knowingly. But there is no allegation of any knowledge by him, at the time the sale was made, of the condition of the meat. The whole allegation

might, therefore, be true, and yet the defendant might be innocent of any offence. The averment of knowledge does not extend to each part of the description of the offence in which it is an essential element. The indictment is therefore fatally defective, because it does not describe, in apt and technical terms, any criminal act for which the defendant can be held responsible, or upon which any valid judgment can be rendered."

The case at bar is similar to Commonwealth *v.* Boynton in all essential features.

Here the language of the statute is, "Any person who shall knowingly deposit," etc., and the indictment contains no allegation of knowledge except that the defendant "did knowingly deposit."

How is this case to be distinguished from Commonwealth *v.* Boynton?

It must be admitted that knowledge is the gist of the offence charged in the case at bar. It could not be reasonably contended that one who deposits a parcel in the mail, being ignorant of its contents, would be liable under this statute if it were non-mailable matter. Knowledge, then, being the gist of the offence, does the indictment contain sufficient allegations that the defendant knew the contents of the letter when, as alleged, he deposited it?

The indictment, so far as it goes, follows the words of the statute; but that is not always sufficient.

"If every allegation may be taken to be true, and yet the defendant be guilty of no offence, then the indictment is insufficient, although in the very words of the statute."

Commonwealth *v.* Hains, 13 Allen, 539.
Commonwealth *v.* Collins, 2 Cush., 558.

No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offence between statutory and common-law offences.

All indictments must specify with technical precision and accuracy, according to the rules of the common law, the particular

facts and circumstances which render the defendant guilty of the offence charged.

United States *v.* Carll, 105 U.S., 611, and cases cited.

In United States *v.* Carll, the indictment on Sect. 5431, Rev. Stat., alleged in the words of the statute that the defendant, feloniously and with intent to defraud, did pass, utter, and publish a falsely made, forged, counterfeit, and altered obligation of the United States; and said indictment was held insufficient after verdict because it did not further allege that the defendant knew it to be false, forged, counterfeited, and altered.

In the opinion of the Court the law is stated as follows: "In an indictment upon a statute it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished."

In Commonwealth *v.* Reily, 9 Gray, 2, the Court say: "It is not sufficient to set out the charge with the words of the statute. It is well settled that such description is insufficient, if it fails in the necessary certainty and precision required by the rules of pleading."

See also on same point United States *v.* Corbin, 11 Fed. Rep., 238.

United States *v.* Reed, 1 Lowell, 232.
Commonwealth *v.* Dean, 110 Mass., 64.
Commonwealth *v.* Bean, 11 Cush., 414.
Commonwealth *v.* Lindsay, 11 Cush., 415.

This point was overruled by the Court below on the ground to matter of form only, and, therefore, under Sect. 1025 of the Revised Statutes, could afford no ground for a motion in arrest of judgment; but it is respectfully submitted that this is not a defect or imperfection in matter of form *only*.

As Judge Lowell said in United States *v.* Conant (Vol. 9 of the Reporter, 36), "That '*only*' is important."

Anything which constitutes part of the description of the crime is not "matter of form."

When Congress makes knowledge the gist of the crime the Court can hardly say it is "matter of form only."

III.

If the Court deem it proper in the present case to construe the statute and answer the questions presented, or either of them, it is respectfully submitted that such questions should be answered in the negative.

"*A letter*" is not within the inhibition of the Act of Congress of July 12, 1876, Sect. 1, unless there is written or printed *upon the envelope thereof* "indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language."

The adjudicated cases on this point are divided; those sustaining indictments in cases similar to the one at bar being, U.S. *v.* Gaylord, 17 Fed. Rep., 438; U.S. *v.* Hanover, *Id.*, 444; U.S. *v.* Britton, *Id.*, 731; U.S. *v.* Morris, 18 Fed. Rep., 900; and U.S. v. Thomas, 27 Fed. Rep., 682.

Those against indictments in similar cases are, U.S. *v.* Williams, 3 Fed. Rep., 484; U.S. *v.* Loftis, 12 Fed. Rep., 671; U.S. *v.* Comerford, 25 Fed. Rep., 902; U.S. *v.* Mathias, 36 Fed. Rep., 892; and U.S. *v.* Huggett, 40 Fed. Rep., 636; U.D. Ohio, July 1, 1889.

The general rules for construction of penal statutes were clearly stated in the case of U.S. *v.* Wiltberger, 5 Wheat., 76–95. We quote from the opinion by Marshall, C.J.: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative not in the judicial department. It is the Legislature, not the Court, which is to define a crime, and ordain its punishment.

"It is said that, notwithstanding this rule, the intention of the

law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new and independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, — that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

Where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the Court not to inflict the penalty. The Enterprise, 1 Paine, 32.

Where it admits of two constructions, that which operates in favor of life or liberty is to be preferred.

Commonwealth *v.* Martin, 17 Mass. 359.
Commonwealth *v.* Keniston, 5 Pick. (Mass.), 420.

Where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. Pretty *v.* Lolly, 26 Beavan, 610, per Romilly, M. R.

The special mention of *letter* indicates that it was not intended to be covered by the general provisions which might otherwise include it.

That private messages of a personal nature enclosed in envelopes are not within the mischief to be remedied by the act appears from the course of legislation as to non-mailable matter.

The Act of March 3, 1865, Sect. 16, provides that "No obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character" should be admitted into the mails, and punished their deposit therein.

The Act of June 8, 1872, Sect. 148, added to the prohibited matter, "any letter upon the envelope of which, or postal card upon which, scurrilous epithets may have been written or printed."

The Act of March 3, 1873, is entitled, "An act for the suppression of trade in, and circulation of, obscene literature and articles of immoral use."

Sect. 1 of this act imposes a penalty upon any one who, in any place within the exclusive jurisdiction of the United States, "shall sell, give away, exhibit, or otherwise publish, or have in possession for such purpose, any obscene book, pamphlet, paper, writing, etc., or shall advertise the same for sale."

Sect. 2 provides that no obscene book, pamphlet, picture, paper, print, or other publication," etc., shall be mailable.

Sect. 3 forbids the importation of the articles and things previously mentioned; Sect. 4 punishes government officers who abet the violation of the act; and Sect. 5 authorizes a search for and seizure of the things named by United States marshals, that they may be condemned.

The word "writing" appears only in Sect. 1 of this act, as also do "drawing," "representation," "circular;" but it was doubtless the intent of Congress to declare that the mails should not be used for the accomplishment of the purposes prohibited in Sect. 1, and the words omitted were clearly intended to be covered by the general designations used in Sect. 2.

The Act of July 12, 1876, inserted the word "writing" in the category of non-mailable books and other publications, and in regard to letters and postal cards substituted the following: "and every letter upon the envelope of which, or postal card upon which, indecent, obscene, lewd, or lascivious epithets, terms, or language may be written or printed."

The word "writing" was inserted, not to enlarge the scope of the Act of 1873, but because in incorporating that act into the Rev. Sts. of 1873, its several sections had been separated and classified, and as they could not readily be viewed together as explaining each other, so much of Sect. 1 was repeated in each separate section as was deemed necessary to make the meaning of the law clear.

This insertion and repetition of the word "writing," therefore, did not render non-mailable any writing not made so by the Act

of 1873, or not belonging to the classes of publications the sale and circulation of which that act sought to repress.

The fact that Congress inserted the word "writing" in the Act of July 12, 1876, in the same clause with book, pamphlet, picture, paper, print, and closed the enumeration with the general phrase, "or other publication," would seem to be conclusive proof that the act was directed against the circulation by mail of such writing only as were publications.

It is not disputed that a writing may be published, but it is clear that every writing is not a publication; and the proposition that mailing a private personal message in a sealed envelope addressed to a friend or correspondent is a publication of such message in the ordinary sense would seem too absurd to admit of argument if there were not reported cases in which it is seriously discussed.

The Act of March 3, 1879 (c. 180, Sect. 21) provides *that all matter declared* non-mailable by Sect. 3893, Rev. Sts., as amended, which shall reach the office of delivery, "shall be held by the postmaster at the said office subject to the order of the Postmaster-General."

Sect. 1785, Rev. Sts., provided that whoever, being "an officer, agent, or employee of the government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of law prohibiting importing or advertising, dealing in, or exhibiting, or sending or receiving by mail indecent publications, . . . shall be deemed guilty," etc.

The language of these laws (Act of March 3, 1879, and Rev. Sts. 1875), read in connection with the general system of postal legislation, shows that the statutes prohibiting sending or receiving by mail written or printed matter relate to publications in the usual sense.

The purpose of this class of legislation was to refuse the facilities of the postal establishment for the distribution of matter deemed injurious to the public morals "consistently with rights reserved to the people of far greater importance than the transportation of the mail."

Ex parte Jackson, 96 U.S., 727.

Free speech, and particularly free speech in private intercourse, and the aversion to interference with it, explain the reluctance of Congress to place letters on the list of non-mailable matter. The conclusive fact against including the word is that from the beginning of the legislation to the recent act (in 1888) letters have never been mentioned as such in the list of prohibited mail matter, nor referred to in the statutes relating to this subject, except in a phrase which by fair implication shows that they were designedly left out of that list when Congress says that there shall be included "every letter upon the envelope of which" the obscene language, etc., appears.

Can it be possible that Congress, wishing to include "letters" in any particular and accurate enumeration, should adopt an ambiguous term to express the idea?

If letters were intended to be included, why was the specific word omitted from the enumeration?

In other statutes relating to the mails the word "letters" is often used, and always when referring to the particular class of matter usually designated thereby; then why in this statute defining a crime omit the technical word and leave to inference and construction that which could most readily and accurately be designated by a well-known term in general use? The only reasonable explanation is the obvious one, — absence of legislative intent to include that specific class of writings.

The fact that the word "letters" was included by Act of Congress of Sept. 26, 1888, amending the act on which the indictment in the present case was founded, in the enumeration of prohibited matter strengthens the argument against forcing by construction into the Act of July 12, 1876, what Congress had not, up to the enactment of the more recent statute, included in its enumeration.

The power of Congress to regulate the entire postal system and designate what shall be carried in the mails cannot be doubted. It may be admitted that Congress may prescribe what letters may be carried, and that a particular class of letters may be excluded; but the exercise of such a peculiar and extraordinary interference with freedom of communication in pri-

vate correspondence is not to be inferred from the language used in the Act of July 12, 1876, on which this indictment is based.

The defendant, therefore, respectfully submits that if answers are given to the questions certified in this case, such answers should be in the negative.

WARREN O. KYLE,
Attorney for Defendant.